REPORT OF THE STANDARD CONTRACT WORKING GROUP

A. Introduction

The efforts of the standard contract working group ("group") were enlivened and informed by the broad participation of informed and articulate people representing a healthy variety of perspectives. There were understandably diverse ideas and conclusions, and the group was not able to reach consensus on all issues.

This report attempts to do three things:

1. Summarize the key principles underlying the efforts of the group.

2. Present and summarize a version of a standard contract reflecting areas of consensus.

3. Set forth, without lobbying or advocacy, the areas in which consensus was not reached, so that all parties (including group members) will have the opportunity to offer comment to the Board on those issues following the issuance of this report.

B. Key Principles

This report, and the efforts of the group underlying it, embody the following key principles:

1. *It's all fair game for comment.* The rapid pace of this process is such that there has often been little time for participants to fully consult with those "back home" as to what is going on. The group thus has proceeded with the understanding that any member of the group is free to offer comments to the Board on any aspect of this report, and that no party has compromised any right to take any position on any issue that may arise surrounding the Board's implementation of the Vermont Energy Act of 2009 ("the Act").

2. *Minimizing the number of documents, and making those documents as simple as possible, is a good idea.* The group had many discussions surrounding whether the Facilitator should issue letters of intent or other "precontract" documents. While there is no right answer to this question, the group determined that there are advantages to an approach that utilizes one document. Among those advantages are the potential lessening of the litigation risks that surrounded the Rule 4.100 letters of intent, and the ability of the developer to show financing entities the "final" contract at the outset.

3. *The body of the standard contract should, to the maximum extent possible, survive both any outcome as to other areas of disagreement, and evolution of the program established under the Act.* As noted above, the group was not able to reach consensus on a number of issues, and those issues are summarized later in this report. It is also

possible that there will be other areas of disagreement arising in other groups, or around issues that have not yet arisen. To the extent that these issues can be resolved outside of the body of the standard contract, such as through modifications to contract attachments or general rulemaking procedures, a greater level of long-term continuity surrounding the standard contract may be achieved, to the benefit of developers, utilities and the facilitator.

C. THE STANDARD CONTRACT DRAFT

The standard contract draft developed by the group is attached to this memo. This section summarizes the contract on a paragraph-by-paragraph basis, and offers a brief explanation of the rationale surrounding key components of the contract.

Par. 1: defined terms. Adopts the definitions used in the Act and others as set out in the contract.

Par. 2: effective date. Under this paragraph, the contract becomes effective when executed by the facilitator. This is consistent with a single document structure that is somewhat like the use of standard form residential real estate contracts. Whatever the queue structure or the initial method for selecting who is in it, the producer will tender the signed contract, plus the administrative and deposit fees, to the facilitator. The facilitator than executes the contract and deposits the funds with respect to those projects that are in the queue, and returns the funds, and does not sign the contract, with respect to those projects that are not. (Not unlike the real estate example, where the prospective buyer fills out the contract and tenders it with a deposit.)

Par. 3: site control. The second attachment establishes the developer's control of the site, as an important way to discourage speculative projects.

Par. 4: milestones. An area on which consensus was not reached; please see the discussion in section D.1 of this report.

Par. 5: failure to achieve milestones. This paragraph makes failure to meet milestones fatal to a project, absent Board order to the contrary. It was the sense of the group that this approach would keep the queue moving, and not burden the facilitator with the challenges posed by too much discretion surrounding what constitutes progress by a project.

Par. 6: administrative fee and deposit. This paragraph requires immediate submission of any administrative fee and/or development deposit. The group was unable to agree as to a structure for such fees and deposits. (See paragraph D.5 of this report.)

Par. 7: rates and term. Consistent with the third principle set out in section 2 of this report, the draft contract suggests a single attachment describing the prices, products and term, in the hope that the body of the contract can remain largely intact through the evolution of the program. Decisions of the Board regarding the rates, term and product

issues will be "plugged in" to attachment C as part of the generic proceedings, and the developer will, prior to tendering the contract and deposit, fill out the attachment to reflect what applies to the developer's project. Neither this paragraph nor any other provision in the body of the draft contract is intended to resolve the issue of what products are being conveyed by producer to facilitator, as consensus was not reached on that issue. (See paragraph D.2 of this report.)

Par. 8: project design and construction. This paragraph obligates producer to construct the project that it has proposed to construct, to help ensure that "real" projects and not mere placeholders come forward.

Par. 9: interconnection. Sets forth the responsibilities of producer to obtain and adhere to the interconnection agreement with the interconnecting utility, and provides that the completed interconnection agreement will become an attachment to the standard offer contract. This paragraph also requires that Facilitator be an additional named insured under any policies required by the Interconnection Agreement.

Par. 10: exclusivity. Precludes the developer from selling the same things twice, or from seeking alternative power sales arrangements for the balance of the contract term should the contract end prematurely, unless the Board orders otherwise.

Par. 11: station service. Recognizing that station service issues have been the subject of various special contracts, tariffs and some litigation over the years, this section simply says that station service will be priced in accordance with applicable Board rulings.

Par. 12: delivery of electricity and other products related to electric generation. Confirms the obligation of the producer to deliver the electricity and other products related to electric generation to facilitator, and the ability of the facilitator to take and utilize them in accordance with the Act.

Par. 13: payment to producer. Confirms facilitator's obligation to pay for the attachment C power and products, and gives facilitator discretion to wait until payments total at least $100.00 before sending them out, to minimize administrative burden.

Par. 14: metering. Obligates facilitator to test meters at least every five years if project is above 100 kw in size, but leaves facilitator discretion for more frequent testing. Gives utilities the authority to ask for additional testing, but they pay if metering proves to be accurate within 2%.

Par. 15: events of default. Sets forth specific events constituting default by producer, including failure to deliver electricity for twelve months, ceasing to hold any required regulatory approvals and utilizing a fuel type other than that specified in attachment A.

Par. 16: cure period and Facilitator remedies. Consistent with the notion of providing limited discretion to the Facilitator, this paragraph limits the authority of Facilitator to

allowance of a thirty day cure period (unless a shorter period is ordered by the Board), after which facilitator must send a termination notice if the default is not cured.

Par. 17: effect of termination or expiration. Makes clear that rights accrued during the term of the contract are not extinguished by the end of the term or the termination of the contract.

Par. 18: force majeure. Again limits the discretion of facilitator by allowing no more than a sixty day suspension of producer obligations upon a force majeure event, absent an order of the Board allowing more time.

Par 19: secured lender rights. Makes clear that the producer does have the right to enter into the types of security agreements necessary for project financing, but that these arrangements cannot alter the standard offer contract terms and cannot obligate the Facilitator to pay the loan or interest on it.

Par. 20: indemnification. Provides indemnification from producer to facilitator and the distribution utilities with respect to claims arising from construction and operation of the project.

Par. 21: joint and several liability. If the producer is comprised of more than one legal entity, all entities are responsible for meeting the producer obligations under the contract.

Par. 22: record retention. Requires retention by facilitator and producer of records necessary for administration of the contract, for a period of at least seven years.

Par. 23: project inspection. Facilitator has the right to inspect the project on five business days' notice.

Par. 24: notice. This provision allows notices to be given in a broad variety of ways, including electronic mail, to facilitate timely communication on matters arising under the contract.

Par. 25: public records issues. Under a 1996 letter ruling of the Vermont Secretary of State, the current facilitator is considered a public body, and acknowledgment of that status in the contract is appropriate to put parties on record that that is the case. This paragraph also obligates facilitator to let producer know promptly if a public records request is received by the facilitator, so that producer can take appropriate actions if it believes disclosure would be inappropriate..

Par. 26: business relationship. Because of the unique nature of the structure of the program, it made sense to the group to expressly indicate that facilitator and producer are independent contractors vis-à-vis one another.

Par. 27: relationship to third parties. This provision confirms that, except to the extent set out in the contract, the contract is not intended to create rights in third parties.

Par. 28: assignment. The Act vests a right in producer to assign the contract, but there is no right to assign certificates of public good under title 30 and Board precedent. This provision essentially acknowledges both components of that reality, and requires that producer notify facilitator of any assignment. Facilitator is also precluded from assigning its obligations unless the Board approves.

Par. 29: setoff rights. When producer owes facilitator money, facilitator can deduct that sum from what facilitator owes to producer.

Par. 30: time of essence. Consistent with the idea that facilitator should have limited discretion and that projects should have clear obligations to move forward or step aside, a "time is of the essence" provision is included in the contract.

Par. 31: further assurances. Commercial reality is such that lenders or other third parties may at times require execution by facilitator of documents confirming the existence of the contract, describing program details, and other things. On the other hand, it is important that facilitator and producer not have the ability to modify a Board approved contract on their own. This paragraph is intended to allow the first of these things to happen while precluding the second.

Par. 32: definitions. Defines capitalized terms used in the contract but not in the Act.

Par. 33: miscellaneous. These are intended to be routine provisions often found in commercial contracts, and they are self explanatory. Sets forth intention that Board has jurisdiction to resolve disputes to the fullest extent permitted by law.

D. AREAS WHERE CONSENSUS WAS NOT REACHED

There were several key areas in which the group did not reach consensus despite diligent and good faith efforts of all group participants. As noted at the outset of this report, the group envisions that all participants in these dockets, including group members, will have the opportunity to offer comment to the Board as to how these issues should be resolved. The order in which those issues are set forth below is not intend to denote any hierarchy as to their importance.

1. MILESTONE ISSUES

The draft contract contains two milestones, one surrounding submission of the application for interconnection and the other surrounding commissioning of the project. (See par. 4 of the contract.) Some group participants felt that this was sufficient in that the rates under the Act would likely stimulate aggressive development and tend to minimize "squatting" issues within any queue that may be developed. Others felt that more comprehensive milestones were needed to help ensure the "rapid deployment" of

projects contemplated by the Act. Given the range of positions surrounding this issue, the group concluded that it should be one for general comment by all parties.

2. "OTHER PRODUCTS RELATED TO ELECTRIC GENERATION" ISSUES

The Act provides that, with the exception of farm methane projects, it shall be a condition of the standard offer program that "tradeable renewable energy credits associated with a plant that accepts the standard offer are owned by the retail electric providers purchasing power from the plant..." In discussions surrounding precisely what projects were selling and facilitator was buying under a standard offer contract, group participants appeared to draw at least two opposing conclusions from this language. Some concluded that, since the Act only specified that tradeable renewable energy credits went to the utilities, the intent is that all other market products beyond the energy itself remain the property of the developer. Others opined that, since the rates under the statute are promulgated based on technology costs rather than market pricing or product expectations, the intent was that all market products, with the limited exception of RECs associated with farm methane projects, were included in what producers are selling and facilitator is getting.

This is obviously an issue of significant importance that needs to be resolved by the Board. Consistent with the goal that the contract body should be able to survive any potential resolution of the issues in contention, the body of the draft contract simply uses an "Other Products Related to Electric Generation" definition that incorporates whatever ends up on the pricing provisions attachment (attachment C) , which can reflect whatever the Board decides on this issue.

3. AMENDMENT OF THE CONTRACT IN THE PUBLIC INTEREST

At least one participant suggested that the contract should have language allowing the Public Service Board to amend the Agreement in the public interest on terms fair to the producer and ratepayers. A similar clause was included in the contracts entered into between the Purchasing Agent and the Qualifying Facilities under Vermont's Rule 4.100 Program. The purposes of such a clause would be to reserve to the Board the ability to introduce SPEED program changes (including new rate designs) to help to optimize the delivery of energy to meet consumer needs, a request to suspend generation when replacement power or other factors make such an operating regime desirable from the consumer perspective (provided that the Producer's investment-backed expectation interests can be honored), a pricing signal to make or refrain from making capital additions (like energy storage devices), or to implement other changes so long as the rights of 1st lenders are protected. Given the very long-term nature of the contractual arrangements to be entered into by the SPEED facilitator and the expectation that the electricity market will be transformed or restructured over this term, this clause would help the Board to keep the SPEED program in close coordination with policies that serve the public interest. The draft contract does not contain such language, as there was no consensus on this issue and it was determined that it would be left open for general comment.

4. SUBDIVISION OF THE QUEUE

The group held a great deal of discussion regarding potential "subdivision" of a queue. While no consensus emerged, four basic approaches (or the possibility of a blend of some of these approaches) evolved from the discussions:

a. Put the full 50 megawatts out in the first offering, with no allocations by technology.

Proponents of this approach have suggested that it is the one most consistent with the legislative intent to achieve "rapid deployment" of projects under the Act, and that it could be difficult to make legal arguments that this approach was flawed as a matter of law, since it is about the most aggressive of the possible approaches. Others in the group expressed concern that putting the full queue out right away could compound the impact of any mistakes that may be made, and could deprive the Board and parties (and perhaps the legislature) of the opportunity to create refinements and course corrections for the remainder of the program.

b. Have a first round for only a predetermined portion of the 50 megawatts, with no allocations by technology.

The group also considered the possibility that the Board could have a first round that filled only a portion, say half, of the queue, but with no subdivision of the queue. Proponents emphasized that this approach would create an opportunity to rectify any mistakes in a later round, so that they would not be all encompassing, and would provide information as to the degree to which various sizes and technologies of projects have responded to the program, and to learn from those responses. Others expressed concern, however, that there could be challenges from developers or others who may believe that failing to open up the entire queue is inconsistent with the legislative intent surrounding rapid deployment.

c. Offer the full 50 megawatts in the first round, but with a cap on any single technology.

It would also be possible to open up all 50 megawatts right away, but with a provision that no technology could occupy more than a certain percentage of the total, and any unfilled space within the cap for each technology space would be the subject of a subsequent reoffering under terms established by the Board. If there were to be an equal 20% cap by technology in the first round, for example, all solar projects and wind projects beyond a 10 megawatt total would not be in the queue, but might be eligible to fill space that remained available if, for example, only 6 megawatts of farm methane came forward in the first round.

The group recognized that this approach embodies some of the advantages and disadvantages of other approaches. Like *b.* above, it leaves some room for correction and improvement, although the amount of that room will not be known until after the first round. It has the effect of ensuring that a diversity of project types will make it into the

queue, though it leaves room for debate, and potential litigation, as to whether the first round caps should be equal for all technologies or should be set out in some other fashion.

d. Develop a comprehensive allocation for the entire queue at this time.

Under this approach, the Board would make a complete subdivision of the queue by technology, size or whatever other criteria it deemed appropriate.

Given the strong legal presumption that rulings of the Board rest broadly within its sound discretion, arguments can be made that this comprehensive approach is within that discretion, and consistent with the implementation of a statute that references both fast implementation and multiple small-scale renewable technologies. The Facilitator would know right off the bat what the program expectations were relative to the various technologies, and utilities and regulators would have a better refined idea of what types of projects, and how many of those projects, will likely appear over the next several years.

Some group members expressed concerns, however, that this approach could be the one most likely to yield contention in the early months of implementation. Developers whose projects were excluded form the queue, and who had no chance at a second round, may well have little to loose by challenging the allocations and/or other procedures surrounding the establishment of the queue. There is also little room for changing direction should the allocations prove to have been unwise.

The nature and diversity of these possibilities, and the likely existence of possibilities that the group did not consider, led the group to the conclusion that there would not be consensus around a recommended approach, and that the process would best be served by tendering this issue for comment by all parties holding opinions on it.

5. QUEUE MANAGEMENT IN THE EARLY DAYS AND WEEKS

It is evident from the discussions of the group that participants hold very divergent views as to how quickly any queue will be filled, and what projects will come forward in the early part of the program. Some participants expressed the view that a queue could be filled within hours if not minutes, and that oversubscription is highly likely.

While all participants agreed that it was vital that the facilitator have the clear and timely Board guidance necessary to be fully prepared for a "rush to the door" should one materialize, there were a variety of views as to how the process should be handled. The following are among the questions regarding queue management that were discussed but not resolved:

a. Filing format.

There was a wide split of opinion as to whether requests for inclusion in the queue should be filed in electronic form, paper form, either or both.

b. "First come, first served" vs. fixed filing period

Some participants opined that, whatever filing methodology is used, queue entry should be determined on a first come, first served basis among all projects tendering the executed draft contract and requisite deposit and administrative fee. Others suggested that a more extended period, followed by a lottery or some other means to address prospective oversubscription, would be more appropriate. Whatever method is ultimately selected, however, the group was unequivocal in its belief that this issue must be resolved thoroughly and quickly.

6. ADMINISTRATIVE FEES AND/OR DEPOSITS

While the group agreed that any initial administrative fees and/or development deposits should be paid at the outset (see contract draft at paragraph 6), there was a broad range of opinion as to what fees and/or deposits should be levied and what the refundability of such monies should be. Some group members felt that a blend of nonrefundable administrative fees and refundable deposit fees (refundable upon project commissioning and/or abandonment) made sense, while others seemed to like only portions of that idea, or little of it at all. There were also diverse opinions among those favoring fees and deposits as to the extent as to which they should be correlated with project size, and whether deposits should be liberally refunded in order to encourage fading projects to drop out and create space within any queue that may exist. Comment is invited in all of these areas.

7. PROVISION OF COST DATA BY PRODUCERS

At least one group member was of the belief that the contract should contain a provision requiring that the producer provide cost data relative to the project, on the theory that such data would facilitate the promulgation of the technology cost based rates that must be set every two years under the Act. Other group members believed that such a provision would cause significant confidentiality problems and yield data that was of little value. A third segment of the group believed that this issue could be dealt with by rule making or future board proceedings, and that it did not need to be resolved at this time. The group did agree to provisions stating that producer would abide by Board orders and rules governing cost data disclosure, and that such information would be regarded as trade secrets under Vermont's public records statutes. (Contract draft at paragraphs 8 and 25.)

8. RELATIONSHIP OF UTILITY PROJECTS TO THE QUEUE

Given the provisions of the Act allowing "credit" for utility projects against the 50 MW set forth in the Act, group members expressed concerns about, and had various opinions regarding, the relationship of utility projects to a queue and to the efforts of the facilitator. For example, there was discussion about whether utilities should be required to give notice of utility projects, what the timing of such notice should be if so, and how the facilitator should handle these issues with respect to standard offer projects that might be near the outside end of a queue. No resolution of these issues was reached, and the group agreed that they should be the subjects of comment.

9. CONCLUSION

Despite the areas of disagreement, the group hopes and believes that it made considerable progress surrounding the many issues involved with the standard contract, and looks forward to the insights that all docket participants will offer regarding the work that has been done.